PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED MARCH 6, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	
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	)	
NEIL KAUFFMAN,	)	No. 95-J-14650
	)	
	)	OPINION ON REVIEW
A Member of the State Bar.	)	
	)	

Respondent Neil Kauffman requests our review over a narrow question; should his agreed-upon suspension from practice in California be retroactive to the time of a suspension from law practice he received in Illinois as he contends or should it be prospective as urged by the State Bar's Office of Chief Trial Counsel (hereafter State Bar or California Bar)?

The hearing judge determined that respondent should receive the same level of discipline in California, an 18-month actual suspension, as ordered in 1995 by the Supreme Court of Illinois for misconduct occurring while respondent practiced in Illinois. The hearing judge also recommended that respondent's California suspension should be prospective and not retroactive to 1995 as respondent had requested. Respondent contends on review that unnecessary delay by the State Bar prevented his suspension from becoming effective earlier. The State Bar argues that neither the facts nor the law warrant imposing his discipline in California retroactively.

Exercising our independent judgment on the record, we determine that a one-year prospective actual suspension as a condition of probation is appropriate discipline, and we adopt it as our recommendation to the Supreme Court.

I. Statement of the Case.

Respondent was admitted to practice law in California in 1978 and in Illinois in 1979. He has no prior discipline in California.

In May 1995, the Supreme Court of Illinois adopted the report of the Review Board of the Illinois Attorney Registration and Disciplinary Commission and suspended respondent for 18 months and until he completed a law office management course.

Although the facts underlying respondent's Illinois discipline are not disputed, a brief summary is appropriate. The Illinois Supreme Court found that, in a client matter arising out of an automobile accident in July 1984, respondent settled his client's case without authority, forged her signature on settlement papers, later commingled the settlement funds with his personal funds and misappropriated his client's $1,500 share of those funds, issuing an insufficient funds check before finally paying his client. In another client matter[1] arising out of an accident on Chicago's public transit system in November 1984, respondent commingled his client funds with his office operating funds and misappropriated the funds he should have held for his client. Finally, the Illinois Supreme Court found that respondent commingled trust funds with personal funds many times between June and November 1988. During that period, respondent deposited the trust funds of 78 clients in his office operating account.

In June 1995, respondent notified the California Bar of his Illinois discipline. Over the next two years, respondent was represented by different counsel than at present. The record shows that, as early as November 1995, the California Bar offered, prior to the filing of this formal proceeding to discipline respondent based on the Illinois discipline,[2] to stipulate to the facts and the same degree of discipline as imposed on respondent in Illinois. The record is unclear as to why a written stipulation was not filed promptly. There is some indication in the record that the parties were

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1. Although respondent was found culpable in Illinois of this second client matter, the charges in the present, California matter inexplicably failed to specifically allege this matter, although they did recite his discipline by the Supreme Court of Illinois. The hearing judge therefore considered this second matter only in aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) At oral argument, respondent conceded that he had proceeded at trial as if the facts of the second matter were in issue in this proceeding. (E.g., *Crooks v. State Bar* (1970) 3 Cal.3d 346, 356-357.) In any case, the parties agree that it would make little difference if these facts were considered as part of respondent's culpability or solely as evidence in aggravation. We concur.

2. See Bus. & Prof. Code, § 6049.1 (hereafter § 6049.1); *In the Matter of Jenkins* (Review Dept., Aug. 7, 2000, 93-J-18832) 4 Cal. State Bar Ct. Rptr. ___, ___ [pp. 5-6].

exploring added conditions of probation. By October 1997, the matter was still unresolved. On November 3, 1997, a State Bar deputy trial counsel sent respondent a proposed written stipulation to finalize the parties' discussions. The next day, that deputy trial counsel and respondent's counsel at the same time spoke by phone and agreed to some changes. That same day, the deputy trial counsel sent respondent's counsel a revised stipulation and asked for counsel's prompt review so that it could be filed before deputy trial counsel departed on a planned leave.

This November 4, 1997, revised stipulation also provided for the same degree of discipline imposed in Illinois, prospective to the California Supreme Court's order.[3] Just after this time, another deputy trial counsel took over this matter on behalf of the State Bar and proposed another stipulation making other changes in probation conditions. In December 1997, respondent's counsel apparently sought to have the 18 months suspension imposed without any probation conditions. Deputy trial counsel advised on December 16, 1997, that the State Bar could not agree to dispense with probation conditions and enclosed a revised stipulation which contained a probation period and the other changes agreed to by respondent's counsel and the previous deputy trial counsel.

The December 1997 stipulation was never signed, and on January 26, 1998, this formal proceeding was started in the State Bar Court. The next day, respondent's present counsel commenced representing him. For the first time, respondent requested that the discipline be made retroactive to coincide with the suspension imposed by the Illinois Supreme Court. The parties were unable to agree to that provision, and the matter was tried below on the sole issue of whether the Illinois discipline should be imposed prospectively or retroactively.

At trial, the State Bar conceded that delay had occurred in the case, but contended that there had been no prejudice to respondent. Respondent argued that to suspend him prospectively would be to suspend him twice for the same conduct. He also contended that his discipline should be retroactive since he did not practice in California during his Illinois suspension, promptly

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3. The parties' focus on the revised stipulation was to limit the applicability of some proposed probation conditions to respondent's practice of law when in California.

reported his Illinois discipline, endured delays caused by the State Bar and his malpractice insurance premium will climb sharply if he were disciplined prospectively.

In her decision, the hearing judge summarized the foregoing chronology, made findings of respondent's culpability as earlier found by the Illinois Supreme Court,[4] concluded that those findings warranted discipline in California and that the 18-month suspension imposed in Illinois was appropriate as the discipline to recommend in California. The hearing judge also considered fully respondent's request for a retroactive suspension but declined to recommend it.

As the judge viewed the evidence, respondent did not make his request until January 1998 when he obtained new counsel. Although his Illinois discipline would result in a separate suspension in California, he was licensed in both states and agreed that he was subject to discipline in both. Moreover, according to the judge, he could have practiced in California while suspended in Illinois had he wished to and his California suspension would still appear to allow him to practice in Illinois, since he had completed his Illinois suspension.

The hearing judge concluded that there was no legal or factual reason why the 18-month actual suspension in California should be retroactive, and she declined to so recommend.

II. Discussion.

Although issues of culpability and overall degree of discipline are not disputed in this review, we exercise an independent judgment on the record. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.) As we observed recently in *In the Matter of Jenkins* , *supra*, 4 Cal. State Bar Ct. Rptr. at page ___ [pp. 5-6], section 6049.1 provides that, with exceptions not applicable here, the Illinois Supreme Court disciplinary order imposed on respondent conclusively establishes his culpability in California. Respondent's Illinois misconduct, involving misappropriation of client funds, repeated commingling of trust funds with personal funds, settling a case without authority, issuing an insufficiently-funded check

4. As noted ante, the hearing judge treated findings of respondent's second client matter solely as evidence in aggravation of discipline.

and forging a client's name to settlement documents, was serious and a clear ground for imposing lawyer discipline in California. (E.g., *Levin v. State Bar* (1989) 47 Cal.3d 1140 [settling case without client's authority]; *Friedman v. State Bar* (1990) 50 Cal.3d 235 [misappropriation of client funds]; *Lawhorn v. State Bar* (1987) 43 Cal.3d. 1357 [commingling].)

In a proceeding under section 6049.1, the appropriate degree of discipline is not presumed by the other state's discipline, but is open for determination in this State. (§ 6049.1, subd. (b) (1); *In the Matter of Jenkins* , *supra*, 4 Cal. State Bar Ct. Rptr. at p. ___ [p. 8].) The hearing judge considered the California Standards for Attorney Sanctions for Professional Misconduct, which are set forth in title IV of the Rules of Procedure of the State Bar (all further reference to Standards are to this source), and concluded correctly that the guided discipline could range from reproval to disbarment. She found both substantial mitigating circumstances and also compelling aggravating ones as well.

In mitigation, the hearing judge acknowledged that, in the Illinois proceedings, respondent presented favorable character evidence, including testimony from two judges. There was no evidence that any other disciplinary complaints had been lodged in Illinois against respondent and respondent's failure to properly handle his trust account did not cause a financial loss to anyone. Respondent had no discipline in California other than this proceeding and none since 1988. Elsewhere in her discussion, the hearing judge stated that respondent's misconduct appeared to stem from accounting disarray and not from venality.

In aggravation, the hearing judge also found that respondent's misconduct was serious, repeated and caused significant harm to the two clients, including overreaching against the client in the first matter. At the time of the Illinois hearings, respondent was unaware of the proper procedure for handling settlement funds and no evidence was shown that he had put in place proper trust accounting procedures.

In reviewing caselaw, the hearing judge deemed the case of *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, comparable, but noted that this case presented

more aggravating and mitigating circumstances than *Sampson*. The Supreme Court imposed a three-year stayed suspension and an eighteen-month actual suspension in that case, the gravamen of which was misuse of client funds.

Other cases imposing discipline for misconduct found here vary widely. For example, in *Levin v. State Bar*, *supra*, 47 Cal.3d 1140, a six-month actual suspension was imposed. In one of the two counts, Levin had settled a case without his client's authority, and in the other, he had communicated directly with a party represented by counsel without that counsel's consent. No misuse of funds was involved; however, Levin's practice of deceit was considered aggravating. Mitigating circumstances were also present including Levin's 18 years of practice without prior discipline.

Discipline for cases in which misuse of funds was the central focus vary from stayed suspension to disbarment. In *Lawhorn v. State Bar*, *supra*, 43 Cal.3d 1357, a two-year actual suspension was ordered for essentially one matter falling between commingling and misappropriation of $1,356 in trust funds with evidence that the attorney used his trust account to pay office expenses.

Respondent reported his Illinois discipline promptly to the California Bar, as he was required to do (Bus. & Prof. Code, § 6068, subd. (o)(6)), but he also sought promptly and willingly to resolve it. In our view, this is a significant mitigating circumstance. (Std. 1.2 (e)(v), (vii); *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111-112.) It has been 12 years since respondent's last act of misconduct for which he was disciplined in Illinois. No evidence of additional misconduct appears. The record does not show the precise cause of the delay in resolving this matter. From what we can glean, neither respondent personally nor any individual deputy trial counsel was the cause of the considerable passage of time. The passage of considerable time without evidence of further misconduct may be considered a mitigating factor. (Std. 1.2(e), (viii); *Chadwick v. State Bar* , *supra*, 49 Cal.3d at p. 112.)

Balancing all relevant considerations (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666), we conclude that the appropriate degree of discipline is a two-year suspension stayed on conditions of a two years' probation and a one year actual suspension.

We now discuss the issue posed in this proceeding, whether the discipline should be retroactive to the date of respondent's discipline in Illinois or prospective. We agree with the hearing judge that neither the law nor the factual record support a retroactive discipline.

All cases cited by respondent to support his claim deal with situations in which there were underlying disqualifications from law practice in California, either interim suspensions (see, e.g., *In re Leardo* (1991) 53 Cal.3d 1) or an inactive enrollments (see, e.g., *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571). The policy of imposing an actual suspension retroactive to the start of interim suspension or inactive enrollment is, in appropriate cases, to avoid a significantly lengthier disqualification from practice than warranted as the appropriate degree of final discipline. Unlike those situations, once respondent was admitted to practice, he has not yet been barred from practicing in California.

Further, we see no reason from the facts in this case to make a retroactive recommendation; even if, arguendo, caselaw supported it. Although there appears to have been significant delay in implementing an agreement between respondent and the California Bar for a stipulated disposition, we do not see any clear evidence that delay was the fault of the State Bar. The record shows that almost as soon as respondent notified the California Bar of his Illinois discipline, it offered to resolve the matter by stipulated disposition. It repeated that offer as the months passed. As we noted *ante*, the record does not show the precise cause of the delay. However, respondent was apparently content until January 1998 to have the discipline operate prospectively, as indicated by the history of this matter. Respondent has argued that one harm of the delay allegedly occasioned by the California Bar would be an increase in cost of his legal malpractice premium. However, even assuming that an increase in insurance premiums might be considered prejudicial to respondent, the brief statement he submitted from his insurance broker shows only that a premium

rise would occur if respondent were to be suspended in California as a result of the Illinois discipline. This evidence shows that his premium would likely rise even if his California discipline were to have become effective earlier.

III. Recommendation.

For the foregoing reasons, we uphold the decision of the hearing judge and recommend that respondent be suspended from the practice of law for a period of two (2) years, that execution of that suspension be stayed and that respondent be placed on two (2) years of probation on the conditions recommended by the hearing judge in her decision, except that we modify her recommended probation condition number one to provide that respondent be actually suspended from the practice of law in the State of California for one (1) year and we modify the hearing judge's probation condition number six requiring that respondent submit to trust account monitoring by a Certified Public Account so that it provides as follows:

> During each calendar quarter in which respondent receives, possesses, or otherwise handles funds or property of a client (as used in this probation condition, the term "client" includes all persons and entities to which respondent owes a fiduciary or trust duty) in any manner, respondent must submit, to the State Bar's Probation Unit in Los Angeles with the probation report for that quarter, a certificate from a Certified Public Accountant certifying:
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> (a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California (or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction);
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> (b) whether respondent has, from the date of receipt of the client funds through the period ending five years from the date of appropriate disbursement of the funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name and address of the client,

(b) the date, amount, and source of all funds received on behalf of the client,

(c) the date, amount, payee, and purpose of each disbursement made on behalf of the client, and

(d) the current balance for the client;

(2) a written journal for each bank account that sets forth:

(a) the name of the account,

(b) the name and address of the bank where the account is maintained,

(c) the date, amount, and client or beneficiary affected by each debit and credit, and

(d) the current balance in the account;

(3) all bank statements and cancelled checks for each bank account, and

(4) each monthly reconciliation (balancing) of (1), (2), and (3) and, if there are any differences, an explanation of each difference; and

(c) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of a client through the period ending five years from the date of appropriate disbursement of the securities and other properties, maintained a written journal that specifies:

(1) each item of security and property held,

(2) the person on whose behalf the security or property is held,

(3) the date of receipt of the security or property,

(4) the date of distribution of the security or property, and

(5) person to whom the security or property was distributed.

If respondent does not practice law in California and does not receive, possess, or otherwise handle client funds or property in any manner in California during an entire calender quarter and if respondent includes, in his probation report for that quarter, a statement to that effect that is certified by affidavit or made under penalty of perjury under the laws of the State of California, respondent is not required to submit, to the State Bar's Probation Unit, a certificate from a Certified Public Accountant for that quarter.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within that year.

We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We also recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

STOVITZ, J.

We concur:

OBRIEN, P. J.

TALCOTT, J.*

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* Hon. Robert M. Talcott, Judge of the Hearing Department, State Bar Court sitting by designation pursuant to the provisions of rule 305(e), Rules of Procedure of the State Bar Court, Title II, State Bar Court Proceedings.

In the Matter of Kauffman

95-J-14650

Hearing Judge:	Hon. Madge S. Watai
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